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In the

Supreme Court of the United States

OCTOBER TERM, 1981

ARMED FORCES COOPERATIVE INSURING ASSOCIATION,
Appellant

v.

DEPARTMENT OF INSURANCE, STATE OF WYOMING

On Appeal From The Supreme Court Of Wyoming

APPELLANT'S SUPPLEMENTAL BRIEF

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APPELLANT'S SUPPLEMENTAL BRIEF

This supplemental brief is submitted by Appellant Armed Forces Cooperative Insuring Association in response to the intervening *Amicus Curiae* brief filed by the Solicitor General on December 9, 1981.

Appellant takes issue with the Solicitor General's recommendation that the appeal be dismissed. Indeed, Appellant believes that the very arguments set forth in the Solicitor General's brief demonstrate the correctness of Appellant's position that at least two important federal questions are raised in this appeal, and that the decision below by the Supreme Court of Wyoming conflicts with decisions of this Court.

The critical federal questions raised in this appeal are:

First, whether Appellant, by virtue of its recognition and support by the federal government and its intimate connection with governmental activity, constitutes a federal instrumentality or whether, as the Wyoming court and the Solicitor General contend — but as this Court has never held — to be a federal instrumentality an organization must be established by a specific statute or regulation.

Second, whether this Court's decision in *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962) — holding that, under

the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, no state may tax or regulate insurance contracts entered into outside its jurisdiction based merely on the presence of insured persons or property within the state — still represents valid law, or whether, as the Wyoming court and the Solicitor General contend, the presence of the insured and his insured property in a state permit that state to regulate and tax the out-of-state insurer.

We discuss each of these questions, and respond to the Solicitor General's comments, below.

I. Appellant Is A Federal Instrumentality And It Must Be Held Immune From State Regulation And Taxation

The Solicitor General contends that Appellant is not a federal instrumentality — and suggests that this Court dispense with the appeal — on one ground: Appellant was not established by a specific statute or regulation. Without that particular type of federal "authorization," the Solicitor General concludes, "there is no basis for concluding that an institution is a federal instrumentality." (Solicitor General's Brief, hereafter "S.G.B.," 9).

But this rule has never before been adopted by this Court. Appellant respectfully submits that the Solicitor General's rigid rule misstates the law and disserves the real interests at stake in this and similar controversies. A fair reading of the case law yields a more sensible and subtle doctrine: to assess the validity of a state effort to tax and/or regulate a federal-related activity, the courts do and should consider all the relevant circumstances and a range of factors. Where, as here, the enterprise is recognized and supported by the federal government, its activities are intimately related to the federal government, its extra-governmental effects and the state's interest in regulating are negligible, and, finally, where state interference will undermine the governmental purpose of the enterprise — then the balance must be struck in favor of immunity.

Indeed, the Solicitor General (S.G.B. 8-9) himself acknowledges that, as this Court ruled in *Department of Employment* v. *United States*, 385 U.S. 355, 358-359 (1966), "[t]here is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality. . . ." Never-

theless, the Solicitor General urges the Court to sanction the Wyoming court's application of a "simple test" in this case. Clearly, this Court has never held or stated that creation by statute or regulation is a *sine qua non* to status as a "federal instrumentality." Rather, the Court has treated the existence of a chartering statute or regulation as merely one of numerous criteria which must be considered in determining whether a particular organization deserves the protection from state taxation and regulation which is afforded to federal instrumentalities.

For example, Justice Marshall, in his dissent in *First Agricultural National Bank of Berkshire County* v. *State Tax Commission*, 392 U.S. 339 (1968), observed that the Court has focused on various factors to determine the status of a specific institution as a federal instrumentality. Such factors include 1) whether it is organized for private profit, 2) whether the government has retained such control over it that it could properly be called a "servant" of the United States in agency terms, 3) whether it is organized to effectuate a specific government program, 4) whether its ownership substantially or totally lies with the government, 5) whether government officials handle and control its operation, 6) whether its officers or any significant portion of them are appointed by the government, 7) whether the government gives it significant financial aid, 8) whether it is charged by law with carrying out some of the government's international commitments, and 9) whether it performs functions indispensable to the workings of a governmental unit. 392 U.S. at 353-354. Interestingly, Justice Marshall did not include in his list the one factor upon which the Wyoming Supreme Court based its entire decision — the necessity of a federal statute or regulation. *See also Standard Oil of California* v. *Johnson*, 316 U.S. 481 (1943) (post exchanges held federal instrumentalities with only passing reference by the Court to statutory recognition of them).

The Courts of Appeals have also applied a practical, multi-factoral approach to determining whether an organization is a federal instrumentality. Recently the Court of Appeals for the District of Columbia Circuit held that the Smithsonian Science Information Exchange, a nonprofit institution incorporated under the laws of the District of Columbia, was a federal instrumentality, although there was no indication in the case that it was created by statute. *Foster* v.

Ripley, 645 F.2d 1142 (D.C. Cir. 1981). *See also United States* v. *Holcombe*, 277 F.2d 143 (4th Cir. 1960) (officers' mess held a federal instrumentality with no reference to any statutory authority for its status); *cf. Kalinski* v. *C.I.R.*, 528 F.2d 969, 973 (1st Cir. 1976) (air force base Child Guidance Center held a federal "agency" for tax purposes, because "The elements of control, with power to initiate and terminate, with effectuation of government purposes paramount over those of organizers and members, and the limitation of membership to government-connected persons, serve to identify an 'agency.' ")[1]

Consideration of the relevant factors and circumstances in the case at bar compels a conclusion that Appellant is a federal instrumentality immune from state taxation or regulation. Apart from its recognition and support by the federal government, and its close involvement with governmental activities, it is plain that exposing Appellant to state taxation and regulation, such as that imposed by Wyoming, would impair and probably completely frustrate the purpose for which Appellant enjoys its federal authorization and support. Since Appellant was first formed at Fort Leavenworth just short of a century

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[1] In addition to emphasizing the absence of explicit statutory or regulatory coverage of Appellant, the Solicitor General also points to the *presence* of Department of Defense and Army regulations on "private organizations." These, it is claimed, include Appellant, and "specifically provide that such private organizations are not instrumentalities of the military department." S.G.B. 9-10, 32 C.F.R. § 212 (1980), AR 210-1 (1974). This, we submit, is not an accurate description of the regulations. Such regulations contain no specific reference to Appellant. They betray no intent to preclude case-by-case inquiries into the status of military-related activities not specified in their provisions. For example, would the Child Guidance Center in the *Kalinski* case, *supra*, be barred by this provision from enjoying instrumentality status vis-a-vis state restrictions on the education of emotionally disturbed children, if it existed at Forth Leavenworth instead of Weisbaden? Such a result would seem unlikely. Yet the *Kalinski* center is not mentioned in the "private organization" regulations, and the Solicitor General's reasoning would seem to preclude such an activity from enjoying instrumentality status. Furthermore, since Appellant is officially recognized within the Department of Defense as a "non-profit military association," it is open to question whether Appellant is a "private organization" under section 212 at all.

ago, that purpose has remained the same — to provide property and (non-auto) casualty insurance coverage to officers in the United States military, specifically tailored to the unique needs of military personnel. Appellant's coverage is inexpensive, comprehensive, uniform across state and national borders, and responsive to the needs of insured military personnel and their families, who must move frequently and upon short notice, and who often leave their possessions in different locations around the world. Equivalent coverage is not available commercially.[2]

Servicemen and women would be deprived of much or all of the benefits of Appellant's service if Appellant were subjected to state regulation and taxation. Appellant's coverages and rates would have to be approved by individual state regulatory authorities and would have to conform to varying state requirements.[3] In at least some instances, this would require Appellant to charge state-determined rates,[4] and to use state-prescribed policy forms.[5] Appellant would have to pay premium taxes, such as the 2½% tax Wyoming seeks to impose, across the country. In addition, even though, as the Solicitor General notes, currently "no salesmen or agents are employed by Appellant and no commissions are paid by it to anyone (S.G.B. 4)," in many states Appellant would have to pay a "minimum commission" on each transaction to a local insurance agent or "attorney."[6]

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[2] For example, servicemen and women must often move with little notice to virtually any point in the United States or abroad; portions of their personal property must frequently be left in more than one spot. To meet this need, Appellant provides world-wide coverage of personal property. It does so with a single policy, with a single, universally applicable rate. Appellant's relations with its insureds are based to a significant extent on trust; most claims are literally paid solely on the word of honor of the insured.

[3] At present, Appellant's coverage and rates are determined by its five-member executive board, all of whom are active duty senior officers at Fort Leavenworth who serve at the pleasure of the Commanding General of Fort Leavenworth. The composition of Appellant's executive board assures that Appellant's insurance will be suitable for the needs of military personnel.

[4] See, e.g. Tex. Ins. Code Ann. art. 5.25, 5.26 (Vernon).

[5] See, e.g., N.Y. Ins. Law, § 168.

[6] See, e.g., Ga. Code Ann. § 817b, Wyo. Stat. § 26-3-130.

Appellant would be required to deposit $800,000 or more with its home state to cover potential claims, and make additional deposits of up to $100,000 each in some other states.[7] Appellant would have to add substantial administrative staff to cope with regulating demands from fifty states. In most states, Wyoming included, Appellant would be liable to be assessed in order to rescue state residents insured by commercial companies that become insolvent.[8]

Plainly, state regulation and taxation would substantially increase Appellant's costs and substantially decrease its ability to serve the special needs of its insureds. These, of course, are the very benefits that motivated its formation and that have sustained its continued authorization and support by the federal government as a non-profit military association.

The Solicitor General asks the court to ignore these factors, and all other factors, except for one — whether there has been a specific chartering statute or regulation. Neither this Court's prior decisions nor sound public policy countenance such a simplistic and rigid approach.

II. This Court's Decision In *Todd Shipyards*, the Fourteenth Amendment and the McCarran-Ferguson Act Bar Wyoming From Taxing Or Regulating Appellant's Activities

Apart from the question of Appellant's federal instrumentality status and the proper standards to be employed in resolving this question, this appeal raises an important question as to the continuing viability, and the scope, of this Court's frequently-cited decision in *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962). There the Court held that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, as elucidated by "an explicit, unequivocal statement" in its legislative history, codifies the rule set forth in numerous prior decisions of this Court by foreclosing to the states regulatory and tax jurisdiction over out-of-state insurers where the

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[7] See, e.g., Ga. Code Ann. § 310.

[8] See, e.g., Wyo. Stat. § 26-37-101 *et seq.*

only significant contact with the state is that the insured person and property are located within it. The Court quoted the House Committee Report on McCarran-Ferguson at length (370 U.S. at 455):

> Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court . . . which hold, inter alia, that *a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way*. Id., quoting H.R. Rep. No. 143, 79th Cong., 1st Sess., 3 (Emphasis added.)

The Court added that, since Congress "tailored the [regime under McCarran-Ferguson] for the insurance business with specific reference to our prior decisions . . .", this rule, among others, was placed beyond the power of the judiciary to change. 370 U.S. at 458.

The Wyoming court's decision, holding that the state could exercise regulatory and tax jurisdiction over Appellant, cannot be squared with the rule articulated in *Todd Shipyards*. It is undisputed that all of Appellant's insurance contracts with persons domiciled in Wyoming were entered into outside that state. As set forth in *Todd Shipyards*, the mere fact that insured persons are domiciled in a particular state, or that the covered risks are located within the state, cannot form the basis for state jurisdiction when the insurance contracts were made outside the state.

The Solicitor General's brief tries to confine *Todd Shipyards* to its particular facts by describing it as holding only that state *taxation* (not regulation) is prohibited regarding insurance transactions, where the *only* contact with the taxing state is that the insured *property* is within its borders. (S.G.B. 14). The problem with the Solicitor General's argument is that it ignores what the Court actually said, and what the Court quoted the Congress as having said. First, the Solicitor General's attempt to limit the effects of *Todd Shipyards* to the states' authority to *tax* out-of-state insurers is misguided. As shown above, where the only basis for jurisdiction is the in-state location of the insured property and the insured's residence, Congress provided, and the Court observed, that states may neither tax *nor* "regulate such

transactions in any way." 370 U.S. at 456. Second, the language quoted above makes it clear that a state is precluded from taxing or regulating insurance contracts "entered into outside its jurisdiction," not simply when the sole contact is that the insured property is located in the state, *but also where the insured is "domiciled" within the state*. 370 U.S. at 456.

The Solicitor General further attempts to distinguish *Todd Shipyards* by arguing that ". . . [T]he panoply of contacts between appellant's insurance transactions and the State of Wyoming far exceeded the minimal single contact between the insurance company and the State of Texas in *Todd Shipyards*." (S.G.B. 14-15). But the Solicitor General's "panoply" consists entirely of items that simply reflect the fact that Appellant's insureds are domiciled in Wyoming.[9] Appellant's contacts with Wyoming come down to two facts — it insures property located in Wyoming and persons domiciled in Wyoming. The Solicitor General identifies no additional meaningful contacts because there are none.[10] But that defines precisely the circumstances that *Todd Shipyards* held to put an out-of-state insurer outside the taxing state's jurisdiction.

Insofar as *Todd Shipyards* would bar state regulation of an out-of-state insurer with in-state insureds, the Solicitor General treats that

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[9] Thus, the Solicitor General lists the "panoply" of contacts between Appellant and Wyoming as follows:

> Here, the property insured by appellant was located in Wyoming [as was the case in *Todd Shipyards*, of course], the insurance was issued to Wyoming residents, the applications and premiums were forwarded from Wyoming, the claims and adjustments originated from Wyoming, and payment was made, if not by check or currency forwarded to Wyoming residents, by bank credits of equal value payable on their order. . . . (S.G.B. 14).

Obviously, each component of this "panoply" is simply an essential and innocuous incident of the fact that some of Appellant's insureds live in Wyoming.

[10] Evidently, the Solicitor General did not consider worthy of mention most of the spurious "contacts" identified by the Wyoming Supreme Court in its equally futile effort to distinguish *Todd Shipyards* (J.S. App. 52-53).

case as inconsistent with, and — even though it was decided subsequently — not as close to a correct statement of the law as *Travelers Health Association* v. *Virginia* 339 U.S. 643 (1950). In his brief the two cases appear as ships passing in the night. But the fact is that the two decisions, both of which were written by Justice Douglas, are easily reconciled and demonstrate clearly why Appellant's situation is within the rule of *Todd Shipyards*.

Where, as in *Travelers Health*, out-of-state insurers initiated massive, active efforts to persuade ("sell" in the Solicitor General's terms) a state's citizens to purchase their products, where such insurers maintained in-state sales forces, whether as open agents on commission or (as in *Travelers Health*) as systematically organized promoters who were in effect surrogate sales agent forces, a state could clearly act to protect its residents as consumers. But where, as prescribed by the holding of *Todd Shipyards*, a state's residents are not the targets of such sales campaigns, the mere fact that they happen to live in a state is *not* justification for its regulating their insurer. The Court in *Todd Shipyards* made that distinction clear, and it further made clear its holding that this is a rule fashioned by Congress, not up to the judiciary to change. 370 U.S. at 457.

In this case it is especially clear that *Todd Shipyards* controls, because Appellant's insureds are not ordinary residents of Wyoming. They are in Wyoming on temporary assignment by their military employer. It is more realistic to regard them as participants in a military world, with no set geographic boundaries, than as residents of Wyoming. The military world is the context to which Appellant's service is tailored. It is there — not to Wyoming — where Appellant's insureds have voluntarily turned, by doing business with Appellant, to look for protection and governance. It is utterly unsupportable for Wyoming to invoke their mere temporary residence within its borders as the decisive "contact" justifying its unwanted intervention in their affairs.

CONCLUSION

For the foregoing reasons, Appellant's appeal should be granted.

Respectfully submitted,

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